

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-4117

Signed

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOSEPH ANASTASIO,

Appellant

v.

COMMISSIONER OF INTERNAL REVENUE,

Appellee

ON APPEAL FROM THE DECISION OF THE
UNITED STATES TAX COURT

BRIEF FOR THE APPELLEE

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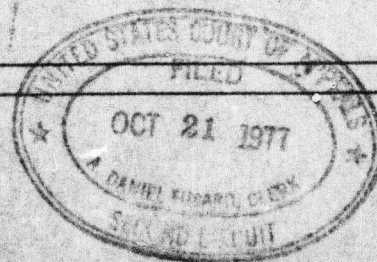




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ON APPEAL FROM THE DECISION OF THE
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BRIEF FOR THE APPELLEE

STATEMENT OF THE ISSUE PRESENTED

In 1970, taxpayer won \$100,000 in the New York lottery. Because he did not attain age 21 until 1971, the state paid the prize to his parents as custodians. Under New York law, the custodial funds are the property of the minor, and may be used for his support, maintenance, education and benefit during minority. The custodial arrangement here was terminated in 1971, and the question presented is whether the \$100,000 prize, and the interest that it earned in 1970 during the custodianship, are taxable to taxpayer in 1970, as the Tax Court held, or in 1971 when the custodianship terminated, as taxpayer contends.

STATEMENT OF THE CASE

This is an income tax case involving a disputed deficiency of \$61,086.39 for the year 1970. (R. 14a.) The case was submitted to the Tax Court on stipulated facts, and the Tax Court's decision in favor of the Commissioner was entered on February 22, 1977. (R. 2a.) Taxpayer's motions to vacate or revise decision and to reconsider the opinion were denied (R. 2a), and taxpayer appeals. The opinion of the Tax Court, by Judge Theodore Tannenwald, Jr., is reported at 67 T.C. 814.

The pertinent parts of the stipulated facts and exhibits are as follows:

Taxpayer's twenty-first birthday was September 1, 1971. He used the cash receipts and disbursements method of accounting in 1970. In February, 1970, he purchased, in his own name, a New York state lottery ticket (Ex. 2-B) for one dollar, and thereby won \$100,000. Because he was a minor, the State of New York issued a check, dated April 13, 1970, for that amount to taxpayer's parents, Carmine and Rafaela Anastasio, as custodians for taxpayer. (R. 4a-5a; Stip. Nos. 2-6.) The Form 1099, U.S. Information Return, which the State of New York filed with respect to this prize (Ex. 3-C), indicates that the prize money was paid to "Joseph Anastasio - Minor * * * (Carmine & Raffaella [sic] Anastasio) Custodians." The Form 1099 also sets forth taxpayer's

1/ "R." references are to Appendix B, infra. Other references are to the original record.

social security number. Relying on the advice of his attorney, taxpayer did not report the \$100,000 lottery prize on his 1970 tax return. (Stip. No. 6; Ex. 1-A.)

The \$100,000 prize was used to purchase a Franklin New York Corporation Note, dated April 22, 1970 (see Ex. 6-F, the confirmation of purchase), and a Franklin Savings Bond, face value of \$52,000. (Ex. 7-G.) The total interest earned on the note and bond in 1970 was \$4,581, and both were held in the names of Carmine and Rafaela Anastasio as custodians for Joseph Anastasio under the New York Uniform Gifts to Minors Act. (R. 5a; Stip. No. 7.)

At no time during 1970 did taxpayer or his parents execute, or have executed on their behalf, any trust indenture for the benefit of taxpayer. Taxpayer's parents filed a Form 1041, United States Fiduciary Income Tax Return, as custodians for taxpayer, for the taxable year ending March 31, 1971. (Ex. 8-H.) That return reported both the \$100,000 lottery prize and the \$4,581 of interest as gross income, but this same \$104,581 was shown as having been distributed to taxpayer within 65 days after the close of the taxable year (i.e., within 65 days after March 31, 1977), with the result that the fiduciary return showed no income tax due.^{2/} Thus, no income tax was paid in connection with the fiduciary return. (R. 5a; Stip. No. 10.)

^{2/} See Section 663(b), Internal Revenue Code of 1954, in connection with the treatment of a trust distribution made within 65 days after the year-end of a trust's taxable year. This provision treats such a distribution as having been made on the last day of the preceding year, and thus as deductible in that year.

Such delivery of the custodial property to taxpayer was made prior to taxpayer's twenty-first birthday (September 1, 1971) because his parents determined that such a distribution would economically benefit taxpayer by enabling him to average his income for federal income tax purposes. Taxpayer reported the \$104,581 on his tax return for 1971, the first year in which he was considered eligible to average his income in accordance with Sections 1301, et seq., Internal Revenue Code of 1954. Pursuant to a request by taxpayer's parents, the Internal Revenue Service issued a private letter ruling (Ex. 9-I) concluding, however, that the prize won by taxpayer was taxable to him in 1970. (R. 6a; Stip. Nos. 11-13.) On the basis of the foregoing facts, the Tax Court determined that the disputed income of \$104,581 was taxable to taxpayer in 1970, and determined a deficiency of \$61,086.39. Taxpayer appeals.

SUMMARY OF ARGUMENT

The Tax Court ruled that taxpayer was taxable in 1970 on a New York lottery prize of \$100,000 and also on the \$4,581 of interest earned in 1970 on the investment of that prize, and rejected taxpayer's contention that he was not taxable on such \$104,581 until 1971. Taxpayer appeals.

Taxpayer, who turned age 21 on September 1, 1971, won \$100,000 in the New York lottery in 1970. Pursuant to New York law, because taxpayer was a minor, the \$100,000 prize was paid to him by issuing a check payable to his parents as custodians for him. The custodial duties and powers of taxpayer's parents were as set forth in the New York Uniform Gifts to Minors Act (the "Uniform Act"). Under the Uniform Act, the prize money and the income earned from its investment could be distributed to taxpayer for his "support, maintenance, education and benefit," and taxpayer could petition for distributions for his "support, maintenance or education." Further, taxpayer had "indefeasibly vested legal title" to the disputed income, and, to the extent not distributed for his benefit, it was to be delivered to him when he reached age 21, or to his estate if he died. In fact, all of the disputed income was released from the custodianship in 1971, before taxpayer turned 21.

1. It is settled that income is taxable to its owner, and that such ownership is to be determined by state law. Poe v. Seaborn, 282 U.S. 101 (1930). The Uniform Act is explicit that custodial property is owned by the minor, who has "indefeasibly vested legal title." Further, the purpose of the Uniform Act is

to facilitate direct gifts to minors, without resort to trusts and legal guardianships, so that custodial property is part of the estate of the minor. The legislative history of the Internal Revenue Code of 1954 is clear on the point that the estate of a minor is not to be treated as a separate taxable entity, such as a trust or the estate of a decedent. As a result, the minor must file a return and pay tax, and it is the duty of his guardian to see that he does so. As the Tax Court noted, where income-producing property is held by a parent as the natural guardian of a minor child, the income is taxable to the child. The same result should pertain to custodial income; it belongs to the minor and, therefore, he is taxable on it. Accordingly, taxpayer was taxable on the disputed income in 1970.

2. An additional reason for taxing the disputed income to taxpayer in 1970 is that he received economic benefit from the income in that year. Even assuming, arguendo, that all that taxpayer received in 1970 was a nonforfeitable right to a \$100,000 fund (plus the income thereon), payable to him no later than age 21, he nonetheless received sufficient economic benefit to make the disputed income immediately taxable to him. The receipt of a nonforfeitable right to an established \$100,000 fund is not a trifling gain, and the overwhelming weight of the authority supports taxation of such an economic gain to the beneficiary (except, of course, when the fund is a gift, which is certainly not the case here). In cases involving compensation income, the general rule is that an employee is taxable upon the receipt of a nonforfeitable

right to future payments from a separate fund that is established for his benefit by the employer, and this rule pertains even where the employee's rights to the future payments are not assignable. The Tax Court has reached a similar result in the case of prize money held in a separate fund for the benefit of minors, Pulsifer v. Commissioner, 64 T.C. 245 (1973). Indeed, the case for taxing taxpayer in 1970 is even stronger than in the compensation cases because, with the acquiescence of his parents, this income could be expended for his "benefit" and, on his own petition, taxpayer could compel disbursements for his "support, maintenance or education." Taxpayer's asserted inability to assign his rights to the fund, and to thereby convert it into cash in hand, is the result of his disabilities as an infant. Such disabilities do not negate the substantial economic benefit that he has received, and do not constitute a shield against the recognition of income. In sum, taxpayer's 1970 economic benefit is as real as it is apparent, and he should be taxed on the disputed income in that year. The decision below is correct, and it should be affirmed.

ARGUMENT

THE 1970 LOTTERY PRIZE AND THE INTEREST
EARNED ON IT IN 1970 ARE TAXABLE TO
TAXPAYER IN 1970, NOT 1971

A. Introduction

In 1970, taxpayer won \$100,000 in the New York lottery, and the investment of that prize yielded interest income of \$4,581 in 1970. The question presented is whether this \$104,581 of income is taxable to taxpayer in 1970, as the Commissioner determined and the Tax Court held, or in 1971, as taxpayer urges. The proper year of taxation is important in this case because taxpayer was not eligible to average his income for federal tax purposes in 1970, but believes that he was so eligible in 1971. Because income averaging, in accordance with Sections 1301, et seq., of the Internal Revenue Code of 1954 (26 U.S.C.),^{3/} operates to reduce taxes, it is to taxpayer's advantage if recognition of the disputed income can be deferred until 1971. Taxpayer estimates that he would thereby save about \$40,000 in taxes. (Tr. 6.)^{4/}

Taxpayer did not report the disputed \$104,581 on his 1970 tax return (Form 1040, Ex. 1-A); rather, treating the custodianship as if it were a trust, his parents reported it on a fiduciary tax return (Form 1041, Ex. 8-H) for the taxable year ended March 31, 1971. This fiduciary return showed no tax due, however, and none was ever paid in connection with it. Instead, the fiduciary return indicated that all of the disputed income had been paid to

^{3/} The Internal Revenue Code of 1954 (26 U.S.C.) is hereinafter referred to as "Code."

^{4/} Taxpayer's eligibility for income-averaging treatment for 1971 has never actually been litigated. (R. 6a, fn. 1.)

taxpayer within 65 days after the year-end (i.e., within 65 days after March 31, 1971). Since Code Section 663(b)(1) provides that a distribution made by a trust within 65 days after the last day of the trust taxable year shall be deemed to have been made on such last day, the fiduciary return showed no tax due, because all of the income that was received was deemed distributed within the same taxable year. In this manner, no federal income tax on the \$104,581 was paid until taxpayer paid his taxes for 1971.

Taxpayer erred in failing to report the disputed income on his 1970 tax return. As we shall demonstrate, that income was paid to taxpayer and he owned it. Neither his infancy nor the custodianship prevents its taxation to him in 1970.

B. The disputed \$104,581 was income of the taxpayer in 1970

Poe v. Seaborn, 282 U.S. 101 (1930) stands for the propositions that income is taxable to its owner, and that the ownership of income is determined by state law. Under New York law, taxpayer was the owner of the disputed income in 1970, and therefore he was taxable on it in that year.

It is stipulated that the payment of the lottery prize in question here was made in accordance with Section 9553(b), New York State Lottery for Education Law (McKinney's Unconsolidated Laws, 1974), which provides:

§ 9553. Certification of prize winners; payment of prizes

* * *

(b) If the person entitled to a prize on any winning ticket is a minor, and such prize is less than five thousand dollars, the commissioner may pay the prize to such

minor if he is eighteen years of age or more, or, if he is less than eighteen years of age, may make payment by delivery to an adult member of the minor's family or a guardian of the minor of a check or draft payable to the order of such minor. If the person entitled to a prize on any winning ticket is a minor and if such prize is five thousand dollars or more, the commissioner may make payment to such minor by depositing the amount of the prize in any bank to the credit of an adult member of the minor's family or a guardian of the minor as custodian for such minor. The person so named as custodian shall have the same duties and powers as a person designated as a custodian in a manner prescribed by part four of article seven of the estates, powers and trusts law [i.e., the New York Uniform Gifts to Minors Act], and for purposes of this section the terms "adult member of a minor's family", and "guardian of the minor" and "bank" shall have the same meaning as in said part of said law. The commissioner shall be discharged of all further liability upon payment of a prize to a minor pursuant to this subdivision. (Emphasis supplied.) 5/

It is noteworthy that, in connection with the "duties and powers" of the custodian, Section 9553(b) incorporates the New York Uniform Gifts to Minors Act, which is codified in New York as Sections 7-4.1 et seq. of the Estates, Powers and Trusts Law, McKinney's Consol. of N.Y. Ann. (hereinafter referred to

5/ For substantially identical provisions in other states which have lotteries, see, e.g., Ann. Code of Maryland, Art. 88D, Section 19, and New Jersey Stats. Ann., Section 5:9-20. Cf. Ann. Laws of Mass., c. 10, Section 34, which is also substantially identical, except that it does not incorporate the Massachusetts Uniform Gifts to Minors Act, and Ohio Rev. Code, Section 3770.07, which, depending on the amount of the prize, directs payment either to the minor's legal guardian or to the adult family member responsible for the minor's care.

as the Uniform Act). The lottery prize was paid by check drawn to Carmine and Rafaela Anastasio, as custodians for Joseph Anastasio, minor (Stip. No. 5), and, as required by the Uniform Act (Section 7-4.3), the note and bond acquired with the prize money were issued in the name of taxpayer's parents as custodians for him "under the New York Uniform Gifts to Minors Act." (Stip. No. 7; Exs. 6-F, 7-G.) Accordingly, taxpayer's rights to the prize money are determined by the Uniform Act.

Uniform Act, Section 7-4.2(a), provides:

§ 7-4.2. Effect of gift.

(a) A gift made in a manner prescribed by this part is irrevocable and conveys to the minor indefeasibly vested legal title to the security, life insurance policy, annuity contract or money given, but no guardian of the minor shall have any right, power, duty or authority with respect to the custodial property except as provided in this part.

Thus, New York law places "indefeasibly vested legal title" to custodial property in the minor, and he is therefore its owner under state law. While the prize money is not a gift in the usual sense, it was held exactly as if it were, and taxpayer's rights to it were exactly the same as if the prize had been a gift under the Uniform Act. The custodian was empowered to expend custodial property for taxpayer's "support, maintenance, education and benefit,"^{6/} and taxpayer, since he was more than fourteen years of age, was entitled to petition for custodial property to be

^{6/} Uniform Act Section 7-4.3(b), Appendix A, infra.

expended for his "support, maintenance or education."^{7/} All of the custodial property was payable to taxpayer when he reached age 21, or to his estate if he died.^{8/} In sum, under New York law, taxpayer was the owner of the custodial property.

The question presented in Poe v. Seaborn, supra, was whether half of the community income of a married couple living in Washington State including half of the husband's salary, was taxable to the wife, even though the husband had broad powers of control over the community property. The Court observed that the applicable Revenue Act taxed the net income of every individual, and that the use of the word "of" denoted ownership. (282 U.S., p. 109.) The Commissioner of Internal Revenue conceded, and the Court agreed, that the question of the wife's ownership of the community property and income was to be resolved by state law: "The answer is found in the statutes of the State, and the decisions interpreting them." (282 U.S., p. 110.)

The Court concluded that the wife was the owner of an interest in the community property, stating (282 U.S., p. 111):

Without further extending this opinion it must suffice to say that it is clear the wife has, in Washington, a vested property right in the community property, equal with that of her husband; and in the income of the community, including salaries or wages of either husband or wife or both.

^{7/} Uniform Act Section 7-4.3(c), Appendix A, infra.

^{8/} Uniform Act Section 7-4.3(d), Appendix A, infra.

The Commissioner objected that the wife was an owner in name only, because of the husband's broad powers of control and alienation over the property, but the Court rejected that argument as unsound (282 U.S., p. 112-113), stating --

We think, in view of the law of Washington above stated, this contention is unsound. The community must act through an agent. This Court has said with respect to the community property system * * * that "property acquired during marriage with community funds became an acquet of the community and not the sole property of the one in whose name the property was bought, although by the law existing at the time the husband was given the management, control and power of sale of such property. This right being vested in him, not because he was the exclusive owner, but because by law he was created the agent of the community."

* * *

The obligations of the husband as agent of the community are no less real because the policy of the State limits the wife's right to call him to account in a court. Power is not synonymous with right. Nor is obligation coterminous with legal remedy. The law's investiture of the husband with broad powers, by no means negatives the wife's present interest as a co-owner.

Just as the law of Washington State provided an agency through which the community could act, the Uniform Act custodianship provides an agency for a minor in the form of a capable, adult custodian, a statutory innovation that was sorely needed and has gained universal acceptance. By its terms, of course, the Uniform Act vests ownership in the minor, Uniform Act, § 7-4.2, supra, and, in the absence of artifice, federal tax law taxes income to its owner.

As in the case of the Revenue Act construed in Poe v. Seaborn, the Internal Revenue Code of 1954 imposes the income tax upon the income "of" the individual,^{9/} and so the reasoning of the Court in Poe v. Seaborn respecting ownership, and its effect upon federal income taxation of the individual, has undiminished force. To be sure, significant power over the custodial property is in the hands of the adult custodian, but, as in the case of the husband's powers described in Poe v. Seaborn, the legislative conferral of such powers on the custodian are "not far to seek." (282 U.S., p. 112.)^{10/} Before the era of the Uniform Gifts to Minors Act, the law of most states discouraged gifts to minors, because the property transferred could be managed only under a guardianship or trust, which could be expensive and rigid, or under an informal arrangement that lacked protection for the minor. The purpose behind the Uniform Gifts to Minors Act^{11/} was to establish a simple legal mechanism for making completed gifts to minors, without

^{9/} Code Section 1.

^{10/} The Uniform Gifts to Minors Act was preceded in many states, including New York, by the Model Gifts of Securities to Minors Act. See, Estate of Chrysler v. Commissioner, 361 F. 2d 508, 510 (C.A. 2, 1966); In re Bushing's Custodian, 167 N.Y.S. 2d 132 (Sur. Ct., 1957).

^{11/} See generally, Newman, The Uniform Gifts to Minors Act in New York and Other Jurisdictions--Tax Consequences, Possible Abuses, and Recommendations, 49 Cornell Law Quarterly, 12 (1963); Zeigler, Gifts to Minors--Three Variations, 24 Tax Lawyer 297 (1971); Note, Recent Legislation to Facilitate Gifts of Securities to Minors, 69 Harv. L. Rev., 1476 (1956); and Annotation, Construction and Effect of Uniform Gifts to Minors Act, 50 A.L.R. 3d 528 (1973).

resort to trusts and legal guardianships.^{12/} It was important, for example, that gifts made under the new procedure would qualify for the \$3,000 exclusion from taxable gifts (for gifts of a present interest in property) that is provided for in Code Section 2503(b) and (c), and gifts under the Uniform Act so qualify.^{13/} In addition, it was important that the arrangement devised, while providing for passage of title to the minor, would also protect third persons dealing with the minor's property, e.g., transfer agents, banks, and brokers, from the usual risks that attend commercial transactions involving minors and their property. As a statutory innovation, the Uniform Act custodianship meets all of these goals by establishing the minor as the owner of property, but delegating certain powers respecting the subject property to a responsible and capable adult. Accordingly, the

^{12/} Cf. Estate of Chrysler v. Commissioner, 361 F. 2d 508, 510 (C.A. 2, 1966), where this Court considered the estate tax ramifications of property registered jointly in the names of the decedent and another, and stated:

It is apparent from the facts of this case that decedent's interest as a joint tenant was purely nominal. The joint tenancies were simply devices for making completed gifts to minors without going through the cumbersome machinery of guardianships or formal trusts which otherwise would have been necessary prior to the enactment of the New York custodianship statute.

^{13/} Rev. Rul. 59-357, 1959-2 Cum. Bull. 212.

court below was correct in concluding (R. 12a) that the Uniform Act does "no more than create a statutory framework, within the specified area, for the exercise of the powers of a guardian to manage the property of minors."

It follows that the Tax Court was also correct in its observation (R. 12a) that custodial income is similar to income from property held by a parent as the natural guardian of a child; in both cases, ownership of the property, and the income derived from it, abides with the child, while the responsibilities of possession and management are reserved to an adult.^{14/} It is settled law, moreover, that income from property held by a parent as natural guardian is taxable to the child. E.g., Miller Trust v. Commissioner, 7 T.C. 1245 (1946); Pettus v. Commissioner, 45 B.T.A. 855 (1941). Taxpayer erred, therefore, in treating the disputed income as if it were taxable to a trust or some entity separate from taxpayer. Indeed, the legislative history of the 1954 Code provisions respecting the taxation of trusts (i.e., Code Sections 641, et seq.) is explicit that the estate of a minor is not to be treated as a separate entity, in contrast to a trust or the estate of a deceased person.^{15/} Thus, S. Rep. 1622, 83rd Cong., 2d Sess., p. 340 (3 U.S.C. Cong. & Adm. News (1954) p. 4980) states:

^{14/} See and compare, I Scott on Trusts, §§ 7 and 16A.

^{15/} It might be noted, however, that, under Code Section 641(a)(2), income "collected by a guardian of an infant which is to be held or distributed as the court may direct" is taxed as trust income. Inasmuch as the Uniform Act custodianship is designed especially to operate without resort to judicial supervision, this provision has no application here.

The several classes of income enumerated in paragraphs (1) through (4) of subsection [641] (a) are carried over from section 161 and are illustrative of estate and trust income dealt with in this subchapter; the classification does not exclude other types of estate and trust income which may fall within the purview of this subchapter. A guardian, whether of an infant or other person, is a fiduciary and, as such, must file a return and pay the tax for his ward; however, the estate of a ward is not a separate taxable entity as is a trust or the estate of a deceased person. (Emphasis supplied.)

See, also, H. Rep. 1337, 83d Cong., 2d Sess., p. A191 (3 U.S.C. Cong. & Adm. News (1954) p. 4331). In complete accord with this committee report, the pertinent Treasury Regulations on Income Tax (1954 Code), § 1.641(b)-2(b) 26 C.F.R.) provide that the estate of an infant "is not a taxable entity separate from the person for whom the fiduciary is acting, in that respect differing from the estate of a deceased person or of a trust."

In sum, the disputed income belonged to taxpayer in 1970, and was not the property of a separate trust. New York State did not intend to create a trust, there was no separation of the legal and beneficial interests in the disputed income, as would exist were there a trust, and there was no instrument creating any trust.^{16/}

It might also be noted that the federal income tax burden on trust income is the highest in the Internal Revenue Code,^{17/} a factor

^{16/} See, Treasury Regulations on Procedure and Administration (1954 Code), § 301.7701-4(a) (26 C.F.R.).

^{17/} The income tax rates on trusts and estates are the most burdensome of the five noncorporate tax rates provided in the Code. Code Sections 641(a) and 1(e). In addition, in the case of a trust not

of which the framers of both the Uniform Act and the lottery law were doubtless aware, and the Commissioner's consistent practice has been to treat custodial income as income of the minor (except in the limited circumstances where it is applied in discharge of a person's obligation to support the minor, when income so applied is taxed to that person).^{18/} The whole thrust of the Uniform Act is to facilitate property transfers to minors, not to impede them, and the Tax Court's conclusion that the minor is taxable on custodial income, as in the case of income from property held for the minor by a natural guardian, is the correct analysis of the income tax law. Taxpayer received the disputed income in the manner provided for minors by the Uniform Act and the lottery law, and he was therefore liable for tax.

17/ (continued):

required to distribute income currently, the personal exemption is limited to \$100. Code Section 642(b). Further, treating a custodianship as a separate trust would jeopardize the Subchapter S status of electing small business corporations. Such corporations are not permitted (with minor exceptions) to have trusts as shareholders, see Code Section 1371(a)(2), and the Commissioner has advised that stock in a Subchapter S corporation transferred to a minor under the Uniform Gifts to Minors Act is considered to be owned by the minor and not by a trust. Technical Information Release 192, Mertens, Law of Federal Income Taxation, Rulings Vol. for 1958-1960, p. M.A. 48. If custodial property were now to be treated as owned by a trust, then Subchapter S corporations with any outstanding stock held for a minor under the Uniform Act could cease to qualify as Subchapter S corporations, resulting in substantial adverse tax consequences.

18/ E.g., Rev. Rul. 56-484, 1956-2 Cum. Bull. 23; Rev. Rul. 59-357, 1959-2 Cum. Bull. 212.

C. Taxpayer received the economic benefit
of the disputed income in 1970

As already discussed, the disputed income was the property of the taxpayer in 1970 under New York law, and for that reason he was properly taxable on it in that year. In addition, we submit that taxpayer received the economic benefit from the disputed income in 1970, and that this, too, supports the Tax Court's conclusion.^{19/} Indeed, the Tax Court's holding (R. 9a) that taxpayer "received sufficient economic benefit to be subject to tax on the prize money in 1970" is clearly correct. Even assuming, arguendo, that in 1970 taxpayer received only a nonforfeitable right to a \$100,000 fund, and the income thereon, to be paid to him when he reached age 21 (without, of course, conceding such to be the case), it can hardly be denied that he thereby received a benefit which he could not otherwise have enjoyed without expending \$100,000. Receipt of an absolute right to a \$100,000 fund, even though actual delivery is not to be made until the future, is not a trifling thing, and the overwhelming weight of authority is that such a fund (in the absence of a gift) is taxed immediately to the beneficiary.

^{19/} It might be noted that this is not a constructive receipt of income case. Constructive receipt exists where a person has not actually reduced income to possession, but nonetheless has such income available to him so that he may draw upon it at any time. Under such circumstances, a person is deemed to have constructive receipt of the income, and is subject to tax on it. Treasury Regulations on Income Tax (1954 Code), § 1.451-2 (26 C.F.R.); e.g., Wolder v. Commissioner, 493 F. 2d 608, 612-613 (C.A. 2, 1974). The instant case does not present the question whether taxpayer turned his back on the disputed income in 1970, thereby being in constructive receipt of it. Rather, the question here is whether, as a matter of actual receipt, he owned the disputed income in 1970, or received the economic benefit of it.

Just as compensation for services is includible in gross income under Code Section 61(a)(1), so too prizes, such as the lottery prize in the instant case, are includible in gross income under Code Section 74(a). While there is little case law dealing with funds established as a prize, there is ample case law dealing with funds established as compensation. Thus, in United States v. Drescher, 179 F. 2d 863 (C.A. 2, 1950), cert. denied, 340 U.S. 821 (1950), this Court ruled that an employee received compensation income in the year that his employer purchased a single-premium, nonforfeitable, annuity contract from an insurance company, naming him as the annuitant. The employee's rights in the annuity contract were not assignable, and it was understood that the employer would retain possession of the contract until the employee reached age 65, when the annuity would commence for his lifetime. This Court ruled that, in the year the annuity was purchased, the employee had received an economic benefit, and was taxable on the value of that benefit in that year, stating (p. 865):

As we shall not overrule the Ward case [Ward v. Commissioner, 159 F. 2d 502 (C.A. 2, 1947)], the question is narrowed to determining whether the present case is distinguishable because the plaintiff's policies are non-assignable and were retained in the possession of the employer. We do not think these facts are sufficient to distinguish the cases with respect to taxability of the contracts, although they may affect the value of the rights the respective annuitants acquired. It cannot be doubted that in 1939 the plaintiff received as compensation for prior services something of economic benefit which he had not previously had, namely, the obligation of the insurance company to pay money in the future to him or his designated

beneficiaries on the terms stated in the policy. That obligation he acquired in 1939 notwithstanding the employer's retention of possession of the policy and notwithstanding its non-assignability. (Emphasis supplied.)

Other courts have similarly held an employee taxable on the value of non-assignable annuity contracts purchased by his employer for the employee's benefit. Hackett v. Commissioner, 159 F. 2d 121 (C.A. 1, 1946); Brodie v. Commissioner, 1 T.C. 275 (1942). See, Oberwinder v. Commissioner, 147 F. 2d 255 (C.A. 8, 1945), where, although the annuity contracts in question were assignable, there was no existing market upon which they could be sold (p. 259), and the employees were taxed upon the amounts expended for the contracts.^{20/} Accordingly, the economic gain that constitutes income subject to tax includes much more than cash in hand; it also includes non-forfeitable funds established for one's benefit, and taxpayer's arguments that he had no benefit because he did not have unfettered control over the disputed income, or because he might not be able to assign his rights to it are without merit. Indeed, the case for taxing the custodial income to taxpayer in 1970 is even stronger than the case for taxing compensatory funds to employees, because taxpayer was entitled by New York Law to petition for distributions for his "support, maintenance and education," a standard which encompasses most important pre-adulthood

^{20/} Cf. Commissioner v. Bonwit, 87 F. 2d 764 (C.A. 2, 1937), cert. denied, 302 U.S. 694 (1937) (fees paid by employer on life insurance for employee taxable to the employee), and Hyde v. Commissioner, 301 F. 2d 279, 283 (C.A. 2, 1962) (life insurance premiums paid by a divorced husband on policies assigned to his former wife held taxable to the former wife).

expenditures. And, while that standard is not altogether without limits, the restraints that it preserves are of general application to infants, and do not negate the fact that a \$100,000 fund is a substantial economic benefit, even if the minor is not free to squander it.^{21/}

The Tax Court was correct, therefore, in determining that taxpayer had received sufficient economic benefit from the disputed income in 1970 to be taxed upon it. The case upon which it relied, Pulsifer v. Commissioner, 64 T.C. 245 (1975), represents a proper application of the economic benefit doctrine to prize money held for the benefit of a minor. In Pulsifer, three minor children won prize-money in the Irish Sweepstakes, but, because they were minors, Irish law required that their winnings be held for their benefit in the Bank of Ireland until they reached age 21 or until an application on their behalf was made to an Irish court for release of the funds. The record in Pulsifer did not disclose whether the minors could assign their rights to the funds held by the Bank of Ireland, but the Tax Court

^{21/} The present physical possession of income is not a prerequisite to its taxation, even to a cash basis taxpayer. It is sufficient that the income is set aside for the ultimate benefit of the taxpayer. Under Code Sections 83 and 402(b), for example, property or money that an employer transfers to a nonexempt trust for the benefit of an employee is immediately taxable to the employee, provided that the employee's rights to the property are not subject to a substantial risk of forfeiture. Perhaps more on point, under Code Section 73 gross income from the services of a child are currently included in the child's gross income, whether or not such income is actually received by the child, and notwithstanding any disabilities with respect to management of the money due to minority.

held (p. 247) that assignability was not relevant. Essentially, the Tax Court ruled that the minors had received an economic benefit from the prize money because it had been irrevocably placed in a fund for their benefit, stating (p. 246):

Under the economic-benefit theory, an individual on the cash receipts and disbursements method of accounting is currently taxable on the economic and financial benefit derived from the absolute right to income in the form of a fund which has been irrevocably set aside for him in trust and is beyond the reach of the payor's debtors [*sic*].

As in Pulsifer, taxpayer here received (at the very least) an absolute right to a fund, amounting to \$100,000 plus interest, and that is an economic benefit which may fairly be held to constitute a prize within the meaning of Code Section 74(a). His asserted inability, by reason of his infancy, to immediately convert his rights to that fund into cash by an assignment of his rights does not diminish his right to the fund, and consequently is no bar to taxation. Further, it would seem that an infant's inability to dispose of all his income is hardly a legitimate ground for deferring taxation. In any event, assignability is not relevant. United States v. Drescher, *supra*; Brodie v. Commissioner, *supra*. The lottery prize and the earnings on that prize were a substantial economic benefit to taxpayer in 1970, and he therefore was taxable on that income in 1970.

Taxpayer's reliance upon Helvering v. Horst, 311 U.S. 112 (1940) is altogether misplaced. In that case, the owner of negotiable bonds detached the negotiable interest coupons, shortly before their due date, and gave them to his son, who in the same year collected

the interest. The Court observed (p. 115) that the owner of a coupon bond had acquired, inter alia, the legal right to demand payment at maturity of the interest specified by the coupons and the power to command its payment to others, and that (p. 118) his power to dispose of the income was the equivalent of ownership of it, with the result that the father was taxable on the interest received by the son. In the first place, Horst is an assignment of income case, dealing with the identity of the person properly subject to tax (assignor versus assignee), not with the proper year of taxation. Further, the court's opinion in that case does not purport to confine the economic benefit analysis to cases where a person assigns his income to another. Indeed, it might be noted that the Horst opinion reinforces the reasoning of Poe v. Seaborn, supra, that income is taxable to its legal owner. Finally, in a later case, Commissioner v. Smith, 324 U.S. 177 (1945), where the Court ruled that an employee received taxable compensation in the year that he exercised a stock option and thereby purchased stock at less than its market value, the Court observed that the Revenue Act of 1938 was (p. 181)--

* * * broad enough to include in taxable income any economic or financial benefit conferred on the employee as compensation, whatever the form or mode by which it is effected.

The present Internal Revenue Code is broad enough, we submit, to include in taxable income a prize in the form of an absolute right to a \$100,000 fund, plus the income thereon, and we fail to see how taxpayer can argue that such a prize is not an economic benefit.

Taxpayer also relies upon the opinion of the Sixth Circuit in Drysdale v. Commissioner, 277 F. 2d 413 (1960), but, while that court did refrain from applying the economic benefit doctrine where an employee's rights to a fund established for his benefit by his employer were nonassignable, that position does not represent the majority rule. United States v. Drescher, supra; Hackett v. Commissioner, supra, Brodie v. Commissioner, supra.^{22/}

CONCLUSION

The decision below is correct and it should be affirmed.

Respectfully submitted,

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OCTOBER, 1977.

^{22/} Cf. Hogan v. United States, 513 F. 2d 170, 174 (C.A. 6, 1975), cert. denied, 423 U.S. 836 (1975), where the Sixth Circuit, addressing the question whether amounts withheld from the pay of a federal employee as employee contributions toward retirement were excludable from the employee's income, cited Brodie v. Commissioner for the proposition of law that--

Present vesting of a right, even if its enjoyment is postponed to the happening of a future event, is an important aspect of gross income for income tax purposes.

CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on opposing counsel by mailing four copies thereof on this 19th day of October, 1977, in an envelope, with postage prepaid, properly addressed to him as follows:

Stanley Pressment, Esquire
1746 East 13th Street
Brooklyn, New York 11229

Gilbert E. Andrews

GILBERT E. ANDREWS,
Attorney.

APPENDIX A

Estates, Powers and Trusts Law, McKinney's Consol. Laws of N.Y. Ann.:

§ 7-4.3. Duties and powers of custodian.

(a) The custodian shall collect, hold, manage, invest and reinvest the custodial property.

(b) The custodian shall pay over to the minor for expenditure by him, or expend for the minor's benefit, so much of or all the custodial property as the custodian deems advisable for the support, maintenance, education and benefit of the minor in the manner, at the time and to the extent that the custodian in his discretion deems suitable and proper, with or without court order, with or without regard to the duty of himself or of any other person to support the minor or his ability to do so and with or without regard to any other income or property of the minor which may be applicable or available for any such purpose.

(c) The court, on the petition of a parent or guardian of the minor or of the minor, if he has attained the age of fourteen years, may order the custodian to pay over to the minor for expenditure by him or to expend so much of or all the custodial property as is necessary for the minor's support, maintenance or education.

(d) To the extent that the custodial property is not so expended, the custodian shall deliver or pay it over to the minor on his attaining the age of twenty-one years or, if the minor dies before attaining the age of twenty-one years, he shall thereupon deliver or pay it over to the estate of the minor.

(e) The custodian, notwithstanding statutes restricting investments by fiduciaries, shall invest and reinvest the custodial property as would a prudent man of discretion and intelligence who is seeking a reasonable income and the preservation of his capital, except that he may, in his discretion and without liability to the minor or his estate, retain a security given to the minor in a manner provided in this part or hold money so given in an account in the financial institution to which it was paid or delivered by the donor.

(f) The custodian may sell, exchange, convert or otherwise dispose of custodial property in the manner, at the time or times, for the price and upon such terms as he deems advisable. He may vote in person or by general or limited proxy a security which is custodial property. He may consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution or liquidation of an issuer of a security which is custodial property, and to

the sale, lease, pledge or mortgage of any property by or to such an issuer, and to any other action by such an issuer. He may execute and deliver any and all instruments in writing which he deems advisable to carry out any of his powers as custodian.

(g) The custodian shall register each security which is custodial property and in registered form in the name of the custodian, followed, in substance, by the words: "As custodian for under the New York Uniform

(name of minor)
Gifts to Minors Act." The custodian shall hold all money which is custodial property in an account with a broker or in an insured financial institution in the name of the custodian, followed, in substance, by the words: "As custodian for

(name of minor)
to Minors Act." The custodian shall keep all other custodial property separate from his own property in such manner as to identify it clearly as custodial property.

(h) The custodian shall keep records of all transactions with respect to the custodial property and make them available for inspection at reasonable intervals by a parent or legal representative of the minor or by the minor, if he has attained the age of fourteen years.

(i) The custodian has such powers with respect to the custodial property, in addition to the rights and powers provided in this part, which a guardian has with respect to property not held as custodial property.

(j) If the subject of the gift is a life insurance policy or annuity contract, the custodian:

(1) In his capacity as custodian, has all the incidents of ownership in the policy or contract to the same extent as if he were the owner, except that the designated beneficiary of any policy or contract on the life of the minor shall be the minor's estate and the designated beneficiary of any policy or contract on the life of a person other than the minor shall be the custodian as custodian for the minor for whom he is acting; and

(2) May pay premiums on the policy or contract out of the custodial property. L.1966, c. 952; amended L.1967, c. 686, §§ 64,65, eff. Sept. 1, 1967.

APPENDIX B
- 1a -
UNITED STATES TAX COURT
GENERAL DOCKET

DOCKET NO. 7134-7

<u>JOSEPH ANASTASIO</u> <u>160 Bay 47th Street</u> <u>Brooklyn, New York 11214</u> PETITIONER. VS. COMMISSIONER OF INTERNAL REVENUE. RESPONDENT.	APPEARANCES FOR PETITIONER: Stanley Pressment, Esq., --12-Weiss-Road, NAME <u>Upper-Saddle-River, New Jersey--0745</u> <u>c/o Sobel, Weissmann & Co., 20 Evergreen Place,</u> ADDRESS <u>East-Orange, New Jersey 07018.</u> <u>c/o Panel-Publishers, 14 Plaza Rd., Greenville,</u> <u>N.Y.--11548 1746 East 13th St., Brooklyn, N.Y.</u> 11229
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Date Month Day Year	Filings and Proceedings	Action	Served
AUG. 22, 1974	PETITION FILED: FEE PAID Sept. 23, 1974 New York, New York		Aug. 23, 1974
Aug. 22, 1974	REQUEST by Petr. for trial at	GRANTED Aug. 23, 1974	Aug. 23, 1974
Oct. 4, 1974	ANSWER by Resp. filed.		Oct. 4, 1974
Jan. 14, 1976	NOTICE OF TRIAL on April 19, 1976 at New York, N.Y.		Jan. 14, 1976
Jan. 21, 1976	NOTICE OF CHANGE OF TRIAL DATE to April 20, 1976.		Jan. 21, 1976
Apr. 20, 1976	TRIAL at New York, New York before Judge Tannerwald.		
	STIPULATION OF FACTS with attached exhibits, filed.		
	SIMULTANEOUS:		
	ORIGINAL BRIEFS DUE: June 21, 1976		
	REPLY BRIEFS DUE: July 19, 1976		
	SUBMITTED TO JUDGE TANNENWALD		
May 18, 1976	TRANSCRIPT of Apr. 20, 1976 rec'd. (2 Vols.)		
June 21, 1976	BRIEF for Resp. filed.		AUG 30 1976
June 28, 1976	MOTION by Petr. to extend time to July 5, 1976 within which to file Opening Brief. (Approved and Ordered Filed this date, Judge)	GRANTED June 28, 1976	JUN 29 1976
Aug. 11, 1976	ORDER, that time in which Petr. shall file Original Brief is extended to Aug. 31, 1976.		AUG 12 1976
Aug. 30, 1976	BRIEF filed by petr.		AUG 30 1976
Sept. 30, 1976	REPLY BRIEF for the Respondent filed. (Leave to file Granted)		OCT 28 1976

continued to page 2

Form No. 10
May 1970

DOCKET NO. 7134-74

(Continuation)

JOSEPH ANASTASIO		PETITIONER	PAGE ²
Date	Filings and Proceedings	Action	Served
Month Day Year			
Oct. 26, 1976	MOTION by Petr. for leave to file Reply Brief out of time. (Reply Brief Lodged)	GRANTED Oct. 27, 1976	OCT 28 1976
Oct. 27, 1976	REPLY BRIEF for Petitioner filed.		OCT 28 1976
Feb. 16, 1977	OPINION filed, Judge Tannenwald. Decision will be entered for the resp.		FEB 16 1977
Feb. 22, 1977	DECISION ENTERED, Judge Tannenwald.		Feb. 22, 1977
Mar. 17, 1977	MOTION by Petr. to Vacate or Revise Decision, entered Feb. 22, 1977.	See Order Mar. 18, 1977	
Mar. 17, 1977	MOTION by Petr. for Reconsideration of Opinion filed Feb. 16, 1977.	See Order Mar. 18, 1977	
March 18, 1977	ORDER that petr. motion for reconsideration filed Mar. 17, 1977 insofar as it moves for review by the entire Court is denied. It Is Further ORDER that the Motion to Vacate or Revise Decision and the Motion for Reconsideration of Opinion filed by petr. March 17, 1977 are denied.		MAR 21 1977
	APPELLATE PROCEEDINGS		
May 16, 1977	NOTICE OF APPEAL to U.S.C.A., 2nd Cir., filed by Petr.		May 17, 1977
May 17, 1977	NOTICE of Filing with copy of notice of appeal sent to Chief Counsel, Mr. Meade Whitaker.		1977
May 17, 1977	NOTICE, to parties, of assembling and date for transmission of record.		May 17, 1977

67 T. C. No. 63

UNITED STATES TAX COURT

JOSEPH ANASTASIO, Petitioner v. COMMISSIONER OF INTERNAL
REVENUE, Respondent

Docket No. 7134-74.

Filed February 16, 1977.

In 1970, petitioner won \$100,000 in a lottery. Because petitioner was a minor at that time, under the applicable state law, the prize money was paid in 1970 to petitioner's parents as custodians under the state's Uniform Gifts to Minors Act. The prize proceeds, and interest earned in 1970 thereon, were turned over to petitioner in 1971. Held, the prize money was income to petitioner in 1970. Held further, the prize money, held by petitioner's parents as custodians under the Uniform Gifts to Minors Act, did not constitute the corpus of a trust. Held further, interest earned on the prize money was taxable to petitioner in the year earned, not the year it was turned over to him by his parents.

Stanley Pressment, for the petitioner.

Michael A. Zimmerman and Richard M. Campbell, for
the respondent.

OPINION

TANNENWALD, Judge: Respondent determined a deficiency in petitioner's Federal income tax for the year 1970 in the amount of \$61,086.39. The sole issue is whether a lottery prize won by a minor, together with income earned thereon, which is made payable under the applicable state law to his parents as custodians, constitutes income in the year the prize is awarded or in the year the money is actually turned over to him by his parents.

All of the facts have been stipulated and are found accordingly. The stipulation of facts and attached exhibits are incorporated herein by this reference.

Petitioner resided in New York, New York, at the time the petition herein was filed. His Federal income tax return for the year 1970 was filed with the Internal Revenue Service Center at Andover, Massachusetts.

In February, 1970, petitioner, who was born on September 1, 1950, purchased in his own name a New York state lottery ticket for \$1.00 and won

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\$100,000. Since petitioner was a minor, the State of New York, pursuant to sec. 9553, N.Y. Unconsol. Laws (McKinney 1974), issued a check dated April 13, 1970, in that amount to Carmine and Rafaela Anastasio, who were petitioner's parents.

The \$100,000 was used to purchase an interest-bearing note and a savings bond in the names of Carmine and Rafaela Anastasio as custodians for Joseph Anastasio, under the New York Uniform Gifts to Minors Act. The total interest earned by the note and bond in 1970 was \$4,581.

At no time during 1970 did petitioner or his parents execute, or have executed on their behalf, any trust indenture for the benefit of petitioner. Petitioner's parents filed a United States Fiduciary Income Tax Return, as custodians for petitioner, for the taxable year ending March 31, 1971. In this return, \$104,581 was included in gross income, but was shown as having been distributed to petitioner within 65 days of the close of the taxable year, with the result that the return showed no income tax due.

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The distribution was made because petitioner's parents, pursuant to New York Estates, Powers and Trusts Law (hereinafter EPTL) sec. 7-4.3(b) (McKinney 1967), determined that the distribution would economically benefit petitioner by enabling him to average his income for tax purposes. Joseph reported the \$104,581 on his Federal income tax return for 1971, the first year in which he was considered eligible to average his income under sections 1301 et seq.¹

The basic issue involved herein is whether, as respondent contends, petitioner received sufficient economic and financial benefits in 1970 to cause the lottery prize and the interest thereon to be taxable to him in that year, or whether, as petitioner argues, he was precluded from possessing the attributes of ownership and enjoyment in 1970, to such an extent that he should not be taxed until he received the money in 1971 because the prize was paid to his parents as custodians. For the reasons hereinafter

¹

All section references are to the Internal Revenue Code of 1954, as amended and in effect during the taxable years in question. The question of petitioner's right to average in 1971 is not before us and we express no opinion thereon.

stated, we hold for respondent.

The applicable New York State Lottery for Education Law provided that if the winner of the lottery was a minor and the prize was \$5,000 or more, payment would be made to the minor by depositing the funds to the credit of an adult member of the minor's family as custodian for the minor. N.Y. Unconsol. Laws. sec. 9553(b) (McKinney 1974). The powers and duties of such a custodian are set forth in part four of article seven of the Estates, Powers and Trusts Law. Under those provisions, the custodian can use the funds, in his complete discretion, "for the support, maintenance, education, and benefit of the minor", EPTL sec. 7-4.3(b); the minor, if he has attained the age of fourteen years, can petition the court to order the custodian to expend the funds held by him for his support, maintenance, or education, EPTL sec. 7-4.3(c); and the custodian must pay whatever amount is not expended to the minor upon his reaching twenty-one years, EPTL sec. 7-4.3(d).

The State of New York issued its check for \$100,000 on April 13, 1970, less than seventeen

months prior to Joseph's twenty-first birthday. The only limitations on his total enjoyment of the prize money were the powers of his parents as custodians to invest the funds as they saw fit and to distribute the funds to Joseph or to hold them for him during that seventeen-month period.

In Stephen W. Pulsifer, 64 T.C. 245 (1975), winnings from the Irish Sweepstakes were deposited in a bank account for the benefit of a minor until he reached 21 years of age or until application for release of the funds was made on his behalf by his legal representative. We held that the minor was taxable in the year the amounts were deposited for his benefit and not in the year of actual receipt by him. Cf. Candido Jacuzzi, 61 T.C. 262 (1973); E. T. Sproull, 16 T.C. 244 (1951), affd. per curiam 194 F.2d 541 (6th Cir. 1952). See also Rev. Rul. 67-203, 1967-1 C.B. 105.

Petitioner seeks to distinguish Pulsifer on the ground that it was not clear in that case whether the minor's rights were assignable and that in the instant case Joseph could not assign his right to

the prize money but could only petition to a court for its release to him or expenditure for his support, maintenance, or education. Putting aside the fact that the applicable New York law does not specifically prohibit an assignment by Joseph and assuming without deciding for purposes of decision herein that petitioner was so prohibited, we are satisfied, as we were in Pulsifer (see 64 T.C. at 247), that petitioner's position is without merit. The mere absence of a right to assign has long been held not to constitute a valid reason for reaching a different result. United States v. Drescher, 179 F.2d 863 (2d Cir. 1950); Renton K. Brodie, 1 T.C. 275 (1942). Nor were the short-term management powers vested in petitioner's parents sufficient limitations upon his enjoyment of the funds to justify postponement of taxation until their removal. See City Nat. Bank & Trust Co. v. United States, 109 F.2d 191 (7th Cir. 1940).

We hold that Stephen W. Pulsifer, supra, controls and that petitioner received sufficient benefit to be subject to tax on the prize money in 1970.

Nannie Carr Harris, 56 T.C. 1165 (1971), revd. 477 F.2d 812 (4th Cir. 1973), relied upon by petitioner, is distinguishable both on its facts and on its legal theory. Our decision in that case was based upon the doctrine of constructive receipt, a concept that significantly differs from the theory of economic benefit (see E. T. Sproull,² 16 T.C. at 246-247), although admittedly the decided cases have not always been a model of clarity in respect of the distinction. See 2 Mertens, Law of Federal Income Taxation, sec. 10.13 (1974 rev.). Since we rest our decision herein on the economic benefit theory, we have no need to consider whether we will follow the reversal of our decision in Harris.

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The cases of Drysdale v. Commissioner, 277 F.2d 413 (6th Cir. 1960), revg. 32 T.C. 378 (1959), and Aaron Watson, T.C. Memo. 1974-63, also relied upon by petitioner, similarly involved the doctrine of constructive receipt and are, therefore, distinguishable.

We think that the foregoing rationale in respect of the prize money is equally applicable to the interest earned in 1970. Joseph argues that for tax purposes the lottery award constituted the corpus of a trust and interest earned from the award should be taxed in accordance with the provisions taxing trusts and beneficiaries. Section 641 et seq.

In enacting the Model Gifts of Securities to Minors Act, upon which the present New York Uniform Gifts to Minors Act is based, the legislature "intended to provide a single and inexpensive method for making gifts of securities to minors without the necessity of resorting to trusts and formal guardianships." In re Bushing's Custodian, 8 Misc. 2d 755, 167 NYS 2d 132, 134 (Surrogate's Ct. 1957). To effectuate this purpose, custodians under the New York Gifts to Minors Act were given broader powers and subjected to fewer restrictions than were trustees. Compare EPTL secs. 7-4.3 and 7-4.4 with EPTC sec. 11-1.1 et seq.

We see no need to elaborate on the distinctions between the powers of a trustee and those of a

custodian under the New York Uniform Gifts to Minors Act. We are satisfied that that Act does no more than create a statutory framework, within the specified area, for the exercise of the powers of a guardian to manage the property of minors. Where income-producing property was held by a parent as a natural guardian for a minor child, we have held that no trust was in existence for tax purposes, and that the income was taxable to the minor child directly. Prudence Miller Trust, 7 T.C. 1245 (1946); James T. Pettus, 45 B.T.A. 855 (1941).³ Property held by a parent as custodian under the New York Uniform Gifts to Minors Act should be taxed in the same manner. Cf. Estate of Chrysler v. Commissioner, 361 F.2d 508, 511 (2d Cir. 1966), reversing on another issue 44 T.C. 55 (1965).

³ See also Dorothy Stuit, 54 T.C. 580, 582 (1970), affd. 452 F.2d 190 (7th Cir. 1971), where we indicated that a custodian was not a "trustee" in the usual sense of that term; Peirsol, "Gifts to Minors: How Effectively Has the Uniform Act Functioned?", 25th Ann. N.Y.U. Tax Inst. 1099, 1111 (1967); Uniform Gifts to Minors, 103 Trust and Estates 983, 993 (1964).

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We hold that petitioner is taxable on the interest earned in 1970.

Decision will be entered
for respondent.

UNITED STATES TAX COURT

77-22 P. 4 25
WASHINGTON

JOSEPH ANASTASIO,

DEPUTY CHIEF OF BUREAU
INTERNAL SECURITY

Petitioner,)

v.

) Docket No. 7134-74
)

COMMISSIONER OF INTERNAL REVENUE,)

)
Respondent.)

DECISION

Pursuant to the determination of the Court, as set forth in its Opinion, filed February 16, 1977, it is

ORDERED and DECIDED: That there is a deficiency in income tax for the taxable year 1970 in the amount of \$61,036.39.

(Signed) GEORGE WERNERWALD, JR.

Judge

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